STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2004
v ANDREW WILLIAM PORCH, Defendant-Appellant.	No. 244390 Wayne Circuit Court LC No. 02-001085

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEITH ANTONIO FINLEY, Defendant-Appellant.	No. 246159 Wayne Circuit Court LC No. 02-008563

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Following a joint jury trial, defendants were each convicted of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Porch was sentenced to concurrent terms of life imprisonment for the murder conviction and twenty-four months to five years' imprisonment for the felon in possession conviction, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant Finley was sentenced to concurrent terms of life imprisonment for the murder conviction and eighteen months to five years' imprisonment for the felon in possession conviction, to be served consecutive to a two-year term for the felony-firearm conviction. Both defendants appeal as of right. We affirm.

I. Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, a defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002) (citations and

internal quotation marks omitted). He must show that his counsel's representation "fell below an objective standard of reasonableness . . . ." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant "must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id*. A defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *Id*. The defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 302-303 (citation and internal quotation marks omitted).

A

Both defendants argue that their attorneys were ineffective for failing to file a pretrial motion to sever their trials. But the record discloses that defendant Finley's counsel did file a pretrial motion to sever, which the trial court denied. The filing of this motion, and the court's denial of it, are fatal to both defendants' arguments on appeal. First, defendant Finley cannot prevail on his claim because the record discloses that his counsel filed the motion. Second, defendant Porch cannot demonstrate that he was prejudiced by his counsel's failure to file the same motion because the court's rejection of defendant Finley's motion demonstrates that, had a similar motion been filed by defendant Porch, it, too, would have been denied. Counsel is not ineffective for failing to file a motion that would have been futile. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

B

Defendant Porch argues that he told defense counsel that he was with his half-sister and her friends at the time of the shooting and that counsel was ineffective for failing to interview these witnesses. In support of this argument, defendant presented the affidavit of his half-sister, who averred that she was with Porch at the time of the shooting and that she was never contacted by Porch's counsel. Defendant Porch did not present an affidavit stating that he informed trial counsel of this witness. At the hearing on Porch's post-trial motion, the trial court concluded that the half-sister's affidavit was "incredible," inasmuch as she claimed that she chose not to come forward to help her half-brother through two murder trials because she had an outstanding traffic warrant. Because the record lacks factual support for a finding that defendant Porch notified trial counsel that his half-sister was a potential alibi witness, and because of the credibility problems apparent from the affidavit submitted by Porch's half-sister, we agree that Porch has not shown that trial counsel was deficient for not contacting the witness, or that the failure to call the witness deprived Porch of a substantial defense. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

C

A prosecution witness from defendant Porch's first trial was listed as a prosecution witness at the second trial. However, the prosecutor discovered that the witness was in Kentucky and moved to delete her from his witness list. Neither defendant objected. On appeal, however, they both argue that their counsel was ineffective for failing to call the witness for their defense.

Decisions regarding what witnesses to call are presumed to be matters of trial strategy for which this Court will not substitute its judgment. *People v Davis*, 250 Mich App 357, 368; 649

NW2d 94 (2002). In this case, it is not clear that the witness could have been called to testify for either defendant because she was out of the state. Moreover, the failure to call a witness may constitute ineffective assistance of counsel only if it deprives the defendant of a substantial defense, i.e., one that might have made a difference in the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *Kelly, supra* at 526. Here, the witness's testimony from defendant Porch's first trial does not demonstrate that her account was so strongly exculpatory that its absence deprived either defendant of a substantial defense.

D

Defendant Porch argues that trial counsel should have impeached prosecution witness Jasmanika Theus with her preliminary examination testimony, which Porch claims was inconsistent with her trial testimony. At trial, Theus testified that she saw Porch swing his gun before shooting it, but did not mention that at the preliminary examination. Porch contends that this inconsistency would have buttressed the defense argument that Theus was lying to protect the father of her child.

We agree with the trial court that counsel was not ineffective for failing to pursue this line of impeachment. First, whether Theus saw Porch swing the gun was not a significant issue in the trial. Her failure to mention it at the preliminary examination was not such a material omission that it would have strongly cast doubt on the credibility of her trial testimony. Second, had counsel attempted to show that Theus did not mention the gun-swinging at the preliminary examination to imply that she was fabricating this fact at trial, counsel may have opened the door for the prosecutor to demonstrate that she had testified at Porch's first trial about seeing Porch swing the gun, and that there were other consistencies between her testimony at the preliminary examination, the first trial, and the second trial. MRE 801(d)(1)(B). The decision not to delve into this minor point was a matter of trial strategy that this Court will not second-guess. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

E

Defendant Porch argues that trial counsel was ineffective for failing to request criminal and arrest records for witness Theus. On appeal, Porch asserts that he

> has reason to believe that the criminal and arrest records of Ms. Theus would have revealed that at the time of trial, Ms. Theus was a convicted felon who had fled confinement at a juvenile facility. This information would likely have been admissible to show witness bias, her motivation for testifying falsely, and also to establish that Ms. Theus may have been cooperating with police and the prosecution in order to garner favor for herself.

However, Porch presented no evidence (not even his own affidavit) in support of his factual assertions. Porch's bald assertions that evidence may exist are insufficient to establish ineffective assistance of counsel.

F

Defendant Porch argues that trial counsel should have moved to suppress Foxworth's and Hughes' in-court identifications of him because neither was able to identify him at a pretrial lineup. He also claims that admission of these identifications constituted plain error.

Porch's argument is legally unsound. The fact that a witness failed to identify a defendant at a pretrial identification procedure does not render a subsequent in-court identification inadmissible. *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995); *People v Hampton*, 138 Mich App 235, 238-239; 361 NW2d 3 (1984).

Porch also claims that counsel should have moved to suppress Foxworth's in-court identification because, after the lineup in which she failed to identify him, an officer informed her that Porch was in the lineup. Porch cites *United States v Wade*, 388 US 218, 228-229, 233; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), for the proposition, "Having a police officer notify a witness that a culprit has been caught and then bringing the defendant before the witness has been found impermissibly suggestive as has pointing out a suspect either before or during a lineup." However, none of those circumstances were present here. Porch cites no authority addressing the propriety of an officer informing a witness *after a lineup* that a suspect, who the witness failed to identify, was in the lineup and whether that information taints a subsequent in-court identification. Although this is a novel argument, it is Porch's responsibility to find authority to support it.

> It is not sufficient for a party "simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." Accordingly, we need not address this issue, and therefore, decline to do so. [*Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Because Porch has not shown that the identifications were inadmissible, he has not shown that counsel was ineffective for failing to move to suppress them, or that plain error occurred.

G

Defendant Porch claims that the prosecutor mischaracterized the identification evidence and that trial counsel was ineffective for failing to object. Having reviewed the prosecutor's challenged remarks in context, we conclude that they were not improper. Moreover, to the extent the arguments could be deemed objectionable, the assertions themselves did not deprive defendant Porch of a fair trial, and counsel's failure to object may have been a strategic decision. See *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). Therefore, defendant Porch has not established that counsel was ineffective for failing to object.

H

Defendants Porch and Finley both assert that their counsel were not present on September 13, 2002, when Judge Morrow, substituting for Judge Waterstone, responded to some

jury questions, and, as a result, were not able to object to either Judge Morrow's substitution or the submission to the jury of a list of the witnesses' nicknames. Both defendants claim that this was a critical stage of the proceedings and, therefore, they need not show prejudice, but, rather, reversal is automatic.

Initially, the record does not support defendant Porch's claim that his counsel was absent. Rather, the transcript for this portion of the proceedings includes a statement attributed to defendant Porch's counsel. Although the record does not clearly indicate that defendant Finley was represented by counsel at this proceeding, we find it unnecessary to remand to clarify whether Finley's counsel was present because we conclude that, even if Finley's counsel was not present, appellate relief is not warranted.

"The complete denial of counsel at a critical stage of a criminal proceeding is structural error rendering the result unreliable and requiring automatic reversal." *People v Russell*, 254 Mich App 11, 21; 656 NW2d 817 (2002) (citations omitted), lv gtd 468 Mich 944-945 (2003). See also *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000), and cases cited therein, including *United States v Cronic*, 466 US 648, 658-659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "Critical stages of the proceedings are stages 'where counsel's absence may harm the defendant's right to a fair trial.'" *People v Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004).

Defendant Finley relies on *French v Jones*, 332 F3d 430, 436 (CA 6, 2003), in which the Sixth Circuit Court of Appeals concluded that the giving of a supplementary instruction was a critical stage of the proceedings and that a harmless error analysis was not appropriate.

More recently, however, the Sixth Circuit has indicated that the determination whether a trial court's communication with the jury is a "critical stage" depends in part on the nature of the communication. *Hudson v Jones*, 351 F3d 212 (CA 6, 2003). In *Hudson*, the Sixth Circuit drew a distinction between providing new, supplemental instructions (as in *French*, *supra* at 430 and *Curtis v Duval*, 124 F3d 1 (CA 1, 1997)) and rereading instructions that the jury had already heard. The court analogized the case to *United States v Toliver*, 330 F3d 607 (CA 3, 2003), a case in which the trial court provided a transcript to the jury in the absence of counsel. There, the Third Circuit Court of Appeals rejected the defendant's argument that the absence of counsel in that instance entitled him to relief under *Cronic*, *supra* at 648. Instead, applying a harmless error analysis, the court implicitly concluded that counsel's absence was not during a critical stage of the proceedings. Relying on these authorities, the Sixth Circuit in *Hudson* concluded that the repetition of instructions "should not be deemed a 'critical stage in the proceedings.'" *Hudson*, *supra* at 218.

The decisions of the Sixth Circuit recognize that the nature of a communication with the jury in the absence of counsel is crucial to analyzing whether the deprivation of counsel occurred during a "critical stage" of the proceedings. Because the communication in this case involved no new instruction, we conclude that the brief meeting between the court and the jury was not a "critical stage" of the proceedings.

Our decision in this regard is supported by our Supreme Court's analysis of an alleged error based on ex parte communication between the court and the jury. See *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). Although the Court in *France* did not expressly

address a denial of counsel claim, the Court's recognition that communications that differ in their basic nature warrant different presumptions of prejudice is consistent with the approach taken by the Sixth Circuit. The Court in *France* explained that substantive communications (including supplemental instruction) are presumed prejudicial regardless of objection, but the presumption may be rebutted "by a firm and definite showing of an absence of prejudice." *Id*. at 163. Administrative communications (including availability of evidence and instructions to continue deliberating) have no presumption of prejudice and "failure to object when made aware of the communication will be taken as evidence that the instruction was not prejudicial." *Id*. If the party objects, "the nonobjecting party must demonstrate that the communication lacked any prejudicial effect." *Id*. at 163-164. Housekeeping communications (including meal orders, restroom needs, or matters unrelated to the case) are presumed not to be prejudicial, and the party must object and must make a definite and firm showing to rebut the presumption of no prejudice. *Id*. at 164. Under the analysis of *France, supra* at 138, the communication in the present case was administrative in nature, and, therefore, no prejudice is presumed. *Id*. at 163. Finley's counsel's failure to object when informed of the communication is evidence that the communication was not prejudicial. *Id*.

Thus, because the portion of the proceeding in question was not a "critical stage," *Hudson, supra,* and because the communication was administrative in nature, *France, supra,* defendant Finley is not entitled to a presumption of prejudice.

Nonetheless, Finley claims that he was prejudiced because his counsel was not present to object to Judge Morrow substituting for Judge Waterstone in violation of MCR 6.440(A), which provides:

> If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on certification of having become familiar with the record of the trial, may proceed with and complete the trial.

The record suggests that this rule was violated because there is no indication that Judge Waterstone was unavailable because of "death, sickness or other disability." Additionally, the record does not show that Judge Morrow familiarized himself with the record of the trial. Nevertheless, failure to comply with this rule does not entitle a defendant to reversal unless he can establish prejudice. *People v Bell,* 209 Mich App 273, 274-277; 530 NW2d 167 (1995). Prejudice has not been demonstrated here. The mere fact that Judge Morrow substituted for Judge Waterstone is insufficient to show the prejudice necessary for relief on defendant Finley's claim that he was denied counsel at the proceeding.

Defendants Finley and Porch both claim that their counsel was not present to object to the presentation of "extraneous information" to the jury during deliberations. Alternatively, defendant Porch asserts that if his counsel was present, he was ineffective for failing to object. The alleged "extraneous information" was the list of the witnesses' names and nicknames that the prosecutor (and perhaps Porch's counsel) compiled following the jury's request. On appeal, both defendants cite MCR 6.414(G), which indicates that the court may permit the jury to take into the jury room "exhibits . . . admitted into evidence."

"A trial court is not to provide the jury with unadmitted evidence." *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996), citing *People v Williams*, 179 Mich App 15, 22-23; 445 NW2d 170 (1989), rev'd on other grounds, 434 Mich 894 (1990). Here, regardless of whether the creation and submission of this list to the jury was improper, defendants are not entitled to relief. The provision of documents or exhibits that were not admitted into evidence does not require reversal unless the error "might have operated to substantially injure the defendant's case." *People v Jones*, 128 Mich App 335, 337; 340 NW2d 302 (1983) (citations omitted). Defendants here do not suggest, much less have they shown, that the list was inaccurate or damaging to their cases. The mere fact that it was provided to the jury is insufficient to show the prejudice necessary for relief on their ineffective assistance of counsel and denial of counsel claims.

I

Next, defendant Porch argues that counsel's performance was deficient because he failed to "approach the prosecution regarding a plea negotiation and present any such offer to the Appellant." At the hearing on Porch's motion for an evidentiary hearing or new trial, the trial court noted that no plea offer had been made as of the final conference on June 14, 2002. The final pretrial conference summary similarly indicates that there was no plea offer. Because the prosecutor was not obligated to make a plea offer, and because the record reflects that no plea offer was made, defendant Porch has not demonstrated that counsel erred or that he was prejudiced in this regard.

J

Defendant Porch claims that counsel was ineffective for failing to object to the aiding and abetting instruction because there was no evidence to support it. We disagree.

Contrary to what defendant Porch argues, Finley's second cousin and Finley's girlfriend both testified that the two defendants knew each other. Moreover, the evidence indicated that two shooters converged on the decedent nearly simultaneously. Because this evidence was sufficient to support the court's aiding and abetting instruction, counsel was not ineffective for failing to object to the instruction. Any objection would have been futile. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Both defendants claim that their counsel was ineffective for failing to request an adverse inference instruction concerning the loss of shell casings and spent rounds. Within their arguments, defendants also claim that the loss of the physical evidence violated their right to due process and their Sixth Amendment right of confrontation.

Defendants primarily rely on case law addressing *Brady*[1] violations, which occur when the state suppresses evidence that is favorable to the defense. But the lost evidence in this case is only potentially exculpatory, and "no more can be said than that it could have been subject to tests, the results of which might have exonerated the defendant[s]." *Arizona v Youngblood*, 488

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988). "Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993) (citations omitted). Here, defendants have not shown bad faith. Sergeant DeLeon testified that the envelopes containing the bullets and shell casings were thrown away, and he believed that a janitor was responsible. Because there was no showing that the evidence was destroyed or discarded in bad faith, defendants' right to due process was not violated.

Moreover, because there was no showing of bad faith, counsel was not ineffective for failing to request an adverse inference instruction. A defendant is not entitled to an adverse inference instruction concerning the loss of potentially exculpatory evidence absent a showing of bad faith. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). Defense counsel is not ineffective for failing to take an action that would have been futile. *Flowers, supra* at 737-738.

Having considered each of the deficiencies asserted by defendants and found them lacking, we further conclude that the trial court did not abuse its discretion in denying defendant Porch's request for an evidentiary hearing. See *In re Whittaker*, 239 Mich App 26, 30; 607 NW2d 387 (1999). Defendant Porch did not show that further development of the record was necessary to resolve his claims. For the same reason, we reject defendant Finley's request that this case be remanded for an evidentiary hearing.

II. Denial of Defendant Porch's Motion for a Directed Verdict

Defendant Porch first focuses on the alleged discrepancy between the witnesses' accounts of shots being fired at the decedent's back and the autopsy results showing that the fatal shots were to the front. According to Porch, "Because the prosecution presented no evidence as to the fatal shots which entered the front of Mr. Wright's body, the prosecution failed to show guilt of a principal beyond a reasonable doubt." This argument is without merit. Viewed in a light most favorable to the prosecution, *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001), the evidence that defendants Porch and Finley repeatedly shot at the decedent was sufficient to allow the jury to find that one or both of the defendants fired the fatal shots. Although no one testified that they saw a shot to the decedent's front, the jury could infer that some of the shots that witnesses saw and heard being fired toward the decedent entered the front of his body and caused his death.

Defendant Porch's claim that the evidence of aiding and abetting was insufficient is also without merit. The evidence showed that two shooters converged on the decedent nearly simultaneously. The jury could reasonably infer that the two were acting in concert.

III. Great Weight of the Evidence

Defendant Porch also argues that the trial court abused its discretion in denying his motion for a new trial because the jury's verdict was against the great weight of the evidence. Specifically, he contends that the testimony of prosecution witness Theus was so seriously impeached and shown to be inherently implausible that it could not be believed. We recognize that Theus' testimony was impeached in certain aspects, that it conflicted with the testimony of other witnesses in some ways, and that her presence at the scene was not confirmed by witnesses,

other than the father of her child. Nevertheless, "'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value . . . '"; therefore, the credibility of Theus' testimony was for the jury to determine. *People v Lemmon,* 456 Mich 625, 643; 576 NW2d 129 (1998) (citation omitted). The trial court did not abuse its discretion in denying Porch's motion.

IV. Exclusion of Evidence of "Other Suspects"

Defendant Finley contends that the trial court erred in denying defendant Porch's request to present evidence that only Porch was accused in the first trial. We need not resolve whether Porch's counsel's request was sufficient to preserve this issue as to defendant Finley. Compare *People v Griffin,* 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999); and *People v Poindexter,* 138 Mich App 322, 331; 361 NW2d 346 (1984). The record does not support defendant Finley's contention. Theus informed the jury that Porch was the only person on trial at the June trial. Finley's claim that the court precluded this evidence is factually inaccurate.

V. Denial of Continuance; Counsel's Preparation

Defendant Finley claims that the trial court erroneously denied his counsel's request for a continuance in order to afford him adequate time to prepare for trial. But Finley does not indicate when counsel allegedly requested a continuance. There is no indication in the record that a written motion for a continuance was ever filed by counsel, and the transcripts submitted to this Court do not reveal that an oral request for a continuance was ever made. In the absence of a request, a trial court does not have a duty to order a continuance on the court's own motion. *People v Elston,* 462 Mich 751, 764-765; 614 NW2d 595 (2000).

Even if a request was made, Finley has failed to demonstrate that he was prejudiced. Trial counsel was appointed three weeks before trial, on August 19, 2002, to replace appointed counsel who was unavailable. During those three weeks, he filed pretrial motions to suppress evidence, for a separate trial, for production of a transcript from Porch's first trial, for appointment of a private investigator, and for discovery of the criminal and arrest records of the chief witness. He also filed a notice of alibi. A defendant must demonstrate prejudice to obtain relief for the erroneous denial of a request for a continuance. *People v Lawton,* 196 Mich App 341, 348; 492 NW2d 810 (1992). Here, Finley has not demonstrated that he was prejudiced by any purported denial of a request for a continuance.

Defendant Finley also claims that counsel was ineffective because he was not prepared. Again, the record does not support this claim. Moreover, Finley has neither explained how counsel's preparation was deficient nor has he shown a reasonable probability that more preparation would have resulted in a different performance, much less a different outcome at trial. Therefore, Finley has not demonstrated that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by the alleged lack of preparation. *People v Caballero,* 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

VI. Cumulative Error

Both defendants argue that the cumulative effect of the errors denied them a fair trial. "[O]nly actual errors are aggregated to determine their cumulative effect." *People v Bahoda,*

448 Mich 261, 292 n 64; 531 NW2d 659 (1995). As discussed in the previous issues, defendants Porch and Finley have not shown that any actual errors occurred. Therefore, they cannot show that the cumulative effect denied them a fair trial.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood